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Supreme Court of the United States

OCTOBER TERM, 1974
No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,
Defendant-Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of themselves and all others similarly situated,
Plaintiffs-Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF BLANK GOODMAN KELLY RONE & STANLEY ON BEHALF OF PLAINTIFFS-RESPONDENTS

Diane Serafin Blank
Nancy E. Stanley

BLANK GOODMAN KELLY
RONE & STANLEY
36 West 44th Street
New York, New York 10036
(212) 869-0020

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STATEMENT OF INTEREST

BLANK GOODMAN KELLY RONE & STANLEY is a feminist law firm created in 1973 in New York City. It was founded in part to provide women with a source of competent legal services and to create a role model for women to initiate their own professional and business enterprises. But in addition, one of the express purposes of the firm -- an outgrowth of the feminist commitment of its founders -- was to meet the growing need to challenge through the legal system those practices and policies which discriminate against women in our society. To help fulfill its purposes, the firm received a foundation grant for special test-case litigation in certain areas where sex-based discrimination has harmed the civil rights of large numbers of women.

The policy at issue in this case is precisely the kind of discriminatory policy which this firm was created to challenge: an employer's efforts to penalize its female workers by denying them disability benefits for a condition -- pregnancy -- unique to them. Amicus believes that its special perspective on the issue before this Court will be of assistance to the Court in its deliberations. As a firm, we are filing this brief amicus curiae to assert our interest in and commitment to changing this policy for all women affected. We also assert a personal interest, for, as working women ourselves, we too are affected by discriminatory policies of this kind which inhibit the professional growth and development of women.

This firm has filed a brief amicus curiae on the issue of denial of disability benefits for pregnancy-related

disabilities in three separate courts prior to this time: the Fourth Circuit Court of Appeals in Gilbert v. General Electric Co., 10 FEP Cases 1201 (1975); the Second Circuit Court of Appeals in Communications Workers of America v. American Telephone & Telegraph Co., 513 F.2d 1024 (1975); and the United States District Court for the Eastern District of Louisiana in Communications Workers of America v. South Central Bell Telephone & Telegraph Co., No. 73-1771, a case which is presently pending. We have received permission of the attorneys for the parties to file a brief in this case, and their consents have been filed with the Clerk of the Court.

Amicus has sought to present aspects of the issue which we believe have not been treated by the parties to the litigation or by other amici. Specifically,

we have attempted to document the depth and breadth of women's participation in the workforce and the extent to which discrimination against women workers has always been a dominant feature of American labor history. In our view, the denial to women of benefits for pregnancy-related disabilities is one more example of the way in which employers, at best, have ignored the needs of female workers and, at worst, have exploited them as a source of cheap labor. As long as such treatment is allowed to continue, fair employment laws for women will constitute an empty promise.

SUMMARY OF ARGUMENT

This is a brief amicus curiae in support of the proposition that Defendant-Petitioner Liberty Mutual Insurance Company's income protection plan for its employees -- a plan

which covers many temporary disabilities, but excludes all disabilities related to pregnancy -- discriminates against women employees in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e et seq. (1970). Specifically, amicus argues that such an exclusion is discrimination on account of sex which violates both Title VII and the regulations issued pursuant to the Act relating to fringe benefits and pregnancy, 29 C.F.R. §§1604.9 and 1604.10(1974), respectively.

First, as is evident from both the language and the legislative history of the Act, Title VII is a broad remedial statute designed to outlaw all discriminatory treatment between men and women in employment, including not only those practices which are overtly discriminatory, but also those practices which have a

detrimental effect on classes of workers protected under the Act.

Second, for nearly two hundred years American companies have systematically paid women low wages, relegated them to the most distasteful jobs and treated them generally as an easily exploited source of cheap labor. Differential treatment of pregnancy disabilities is merely one more example in a long history of discrimination against members of the female workforce.

Third, Title VII prohibits pregnancy discrimination by employers against their employees regardless of whether or not similar policies incorporated in the social welfare legislation of a state may withstand constitutional scrutiny under the Fourteenth Amendment.

Finally, amicus argues that any increased costs to an employer of providing pregnancy benefits is not, under

Title VII, a defense to denying them, since denying such benefits serves only to reinforce already deeply entrenched patterns of discrimination against women workers.

ARGUMENT

I

TITLE VII IS A BROAD REMEDIAL STATUTE DESIGNED TO ELIMINATE ALL POLICIES HAVING A SEX-DISCRIMINATORY IMPACT IN EMPLOYMENT.

A. Language and Legislative History

Title VII was enacted not only to eliminate employment practices discriminatory on their face, but also to strike down the conditions, policies and practices that lead to unequal employment opportunity for protected classes of workers. This purpose is evident from both the language of the Act and its legislative history.

The Act by its terms prohibits practices which discriminate "in any way," which "tend to deprive" persons of equal employment opportunity or which "otherwise adversely affect" employment conditions for minorities or women. §703(a)(2) of the Act, 42 U.S.C. §2000e-2(a)(2). These phrases make it clear that in adopting Title VII Congress intended "to define discrimination in the broadest possible terms."[1/]

The legislative history to Title VII also reflects the congressional intention to strike at the broad range of employment practices that have a detrimental effect on protected classes of workers. For example, a proposed amendment to Title VII that would have limited the Act to discrimination based "solely" on sex,

1/ Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv. L.Rev. 1598, 1612 (1969).

race, religion or national origin was twice defeated. 110 Cong. Rec. 2728 (1964); 110 Cong. Rec. 13838 (1964). As Senator Magnuson pointed out when the amendment was rejected, such a provision "would so limit this section as probably to negate the entire purpose of what we are trying to do" in passing Title VII. Id. 13837.

Moreover, when Congress amended Title VII in 1972, it reaffirmed the Act's broad, remedial purposes in the strongest terms. The Senate Committee on Labor and Public Welfare characterized the Act as follows:

> Employment discrimination, as viewed today, is a . . . complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effects of pre-act discriminatory practices through

various institutional devices, and testing and validation requirements. In short, the problem is one whose resolution in many instances requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful. S. Rep. No. 91-1137, 91st Cong., 2d Sess.1 (1970), at 4.

B. Judicial Interpretation

In applying Title VII, the courts have adopted the same broad view. In this Court's words in Griggs v. Duke Power Co., 401 U.S. 424 (1971):

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. Id. at 431.
>
> The objective of Congress . . . was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees. Id. at 429-30.
>
> . . . Congress directed the thrust of the Act to the consequences of

> employment practices, not simply the motivation. Id. at 432. 2/

In other words, the thrust and purpose of Title VII is to eliminate all practices, whether they are overtly discriminatory or have a discriminatory impact, which create artificial barriers to equality of employment opportunity. 3/

2/ Accord, McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973): The purpose behind Title VII is ". . . to eliminate those discriminatory practices and devices which have fostered . . . stratified job environments to the disadvantage of minority citizens." (emphasis added).

3/ There are two principal defenses to discrimination under Title VII, and both have been narrowly construed. One is the "bona fide occupational qualification," applicable only to overt policies of discrimination against women. See §703(e) of the Act, 42 U.S.C. §2000e-2(e). The BFOQ justifies a refusal to hire women for certain jobs only if it is reasonable to assume that no woman, anywhere, could perform the job in question. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); cf. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

The second defense is the "business necessity" test, applicable where a policy is facially neutral but discriminates in its effect. This defense is also available only under the very narrowest circumstances: ". . . the business purpose must be

[footnote continued]

Operating from this perspective, the courts have struck down as discriminatory a wide range of employment practices including educational and testing requirements,[4] word-of-mouth recruitment practices,[5] departmental seniority systems,[6]

[footnote 3/ continued]

sufficently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential [discriminatory] impact." Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971) (emphasis added). See also, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); United States v. N.L. Industries, Inc., 479 F.2d 354 (8th Cir. 1973); Head v. Timken Roller Bearing Co., 486 F.2d 870 (6th Cir. 1973).

4/ Griggs v. Duke Power Co., 401 U.S. 424 (1971) (disproportionate impact on blacks).

5/ United States v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973) (disproportionate impact on blacks).

6/ Local 189, Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970) (disproportionate impact on blacks).

height-and-weight requirements for particular jobs,[7] rules against hiring persons with arrest records,[8] and rules preventing inter-departmental transfers.[9] The focus in all these cases was not to determine whether the policy was intentionally discriminatory, but whether its effect was to reinforce patterns of discrimination and lock women or minorities even more firmly into an inferior position in the workforce. As we will show below, the denial of pregnancy benefits is a policy with precisely this kind of impact. Since only women become pregnant,

7/ Meadows v. Ford Motor Co., 510 F.2d 939, (6th Cir. 1975) (disproportionate impact on females).

8/ Gregory v. Litton Systems, Inc. 472 F.2d 631 (9th Cir. 1972) (disproprotionate impact on blacks).

9/ Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971) (disproportionate impact on blacks).

denying benefits for only those disabilities associated with pregnancy inevitably injures women workers to a disproportionate extent. Consequently, such a policy is exactly the kind of employment practice to which Title VII applies.

II

DIFFERENTIAL TREATMENT OF PREGNANCY DISABILITIES IS ONE OF THE MANY PRACTICES USED BY EMPLOYERS TO DISCRIMINATE AGAINST WOMEN WORKERS AND MAINTAIN THEM IN AN INFERIOR POSITION IN THE WORKFORCE.

A. Historical Position of Women in the Workforce

Historically, women workers have always been among the most exploited members of the American labor force. Since women first entered the industrialized workforce, employers have sex-segregated them by industry, have relegated them to the jobs with the least pay and prestige,

have paid them less than men for comparable work, and have denied them entry or promotion into higher level, more lucrative and prestigious positions.

In the eighteenth century, when women first entered the workforce in large numbers, they were immediately channeled into low paying jobs and industries. They were heavily concentrated in the service industries -- traditionally the lowest paying jobs with the least status -- primarily because such jobs were the natural extensions of the nursing, cooking, cleaning, teaching, and sewing functions women perform as homemakers and mothers. Laundry work, for example, was thought fit for only "wimmin" and "naygurs."[10/] For women with some education

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10/ R. W. Smuts, Women and Work in America 88 (1974) [hereinafter cited as Smuts].

and middle-class status or aspirations, teaching was the only job open to them until the late nineteenth century.[11]

It was only during times of war and severe labor shortage that women workers were given an opportunity to perform "men's jobs." During World War I, for example, women swarmed into factories to replace men at the front. The number of women employed in the iron and steel industries trebled. Over 100,000 women entered munitions factories while countless others served as streetcar conductors, elevator operators, furnace stokers and brick layer helpers. The Women's Bureau required four pages to list all the jobs in which women substituted for men during the fighting. The Government appointed female lawyers to its advisory committees and for the first time, female doctors gained access to the U.S. Public

11/ Id. 19.

Health Service. The same pattern was repeated during World War II when war industries were confronted with a severe labor shortage. Rosie the Riveter became a new heroine and industries established day care centers to meet the child-care needs of the suddenly indispensable woman worker.[12]

After both wars, however, opportunities for women in male-dominated jobs disappeared as quickly as they had been created. The industry-supported day care centers were dismantled and women were forced to resign their jobs

12/ W. H. Chafe, The American Woman: Her Changing Social, Economic, and Political Roles, 1920-1970, at 51, 162-63 (1972) [hereinafter cited as Chafe].

to make way for returning veterans.[13] As the reformer Mary Van Kleeck wrote after World War I, "When the immediate dangers . . . were passed, the prejudices came to life once more."[14]

Women have always been regarded as marginal workers, the most expendable members of the labor force when times are hard. During the Depression, the unemployment rate among women far exceeded that of men. By 1938, 22.1% of women were totally unemployed, as compared with 14.3% of men.[15] The woman

13/ Typical of the prevailing attitude was the pronouncement, in 1919, by the Central Federated Union of New York, that "the same patriotism which induced women to enter industry during the war should induce them to vacate their positions after the war." Women professionals fared no better. After the Armistice, twenty female judges in New York were forced to resign to make way for returning veterans. Id. 53.

14/ Id. 54.

15/ Id. 270, n. 20

wage earner, Senator Robert Wagner concluded, was the "first orphan in the storm."[16]

Where women did hold jobs, they labored under extremely poor working conditions, particularly in the low-wage, marginal industries where many women tended to be employed. For the most part shops were small, housed in badly lit, steaming firetraps where sanitary conditions were abhorrent and the noise deafening. Many factories, in the garment and food trades in particular, were overrun with vermin. The air was contaminated by lint, tobacco, glass or mica dust, or poisonous with dangerous fumes. Floors were slimy from constant expectoration, and tuberculosis, pneumonia and respiratory diseases were common. Crushed

16/ Id. 58.

fingers and limbs were the rule wherever machines were used.[17] In 1911, 146 women died in a fire at the Triangle Shirtwaist Factory because of inadequate safety measures and because factory owners had barred the exits to the stairways, allegedly to prevent the women from stealing merchandise or leaving their machines in a sudden strike.[18] In addition to unsanitary and unsafe working conditions, women also were forced to endure the sexual advances of their employers.[19]

17/ See Smuts, supra note, 10 at 74-79.

18/ E. Flexner, Century of Struggle 363, n.1 (1968).

19/ Employers and supervisors were always in position to force their attentions on women workers, through threats of termination, or alternatively, promises of promotion. Sexual abuse of this kind was particularly common among domestic employees. Some employment agencies for domestic workers were procurers for houses of prostitution, and, in 1887, public concern over the moral conditions of women's employment led to an official investigation by the U.S. Bureau of Labor which found that 30%

[footnote continued]

Despite these abuses, however, when the collective conscience of America pressed for labor reform in the late nineteenth century, women were largely overlooked. The male trade union movement in its early stages resisted the organization of women workers, fearing their competition.[20] As unionization gained ground

[footnote 19/ continued]

of the prostitutes interviewed had previously worked as domestics. Smuts, supra note 10, at 72-73, 88-89.

Lest it be thought that sexual harassment on the job is a thing of the past, however, see Corne v. Bausch & Lomb, Inc., 390 F.Supp. 161 (D.C. Ariz. 1975). In its amicus curiae brief in that case, the Equal Employment Opportunity Commission has taken the position that such intimidation is a prohibited discriminatory practice. Brief for EEOC as Amicus Curiae, Corne v. Bausch & Lomb, Inc., No. 75-1857 (10th Cir., appeal docketed ____, 1975).

20/ Gunnar Myrdal's appendix to the classic An American Dilemma, "A Parallel to the Negro Problem," notes that:

> All over the world men have used the trade unions to keep women out of competition. Woman's competition has, like the Negro's, been particularly obnoxious and

[footnote continued]

among the male-dominated skilled trades, union members, like those in the American Federation of Labor, showed little inclination to spend money to organize their sisters employed in the low-paid unskilled trades.[21] When women did attempt to organize themselves in these industries, they were rejected for membership in the male unions on the grounds that

[footnote 20/ continued]

> dreaded by men because of the low wages women, with their few earning outlets, are prepared to work for.

Cited in Hearings on §805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. & Labor, 91st Cong., 2d Sess., Pt. 2, at 901, 905-06 (1970).

The International Moulders Union, for example, resolved to restrict the employment of women in all foundries and jobs "recognized as men's employment." Chafe, supra note 12, at 77. Early successful but short-lived women's unions, such as the laundry workers of Rochester, New York, and the shoemakers of Lynn, Massachusetts, were supported by male workers largely because women and men did not compete in these female-intensive industries.

21/ Despite repeated requests, the AFL did not hire a full-time female organizer on a long-term basis until 1918. Chafe, supra note 12, at 76.

they were unskilled, rather than skilled, workers.[22] The problems of organization were compounded by the early decisions of male trade union leaders to discontinue chartering separate women's locals. This policy ensured that women would remain a powerless minority with no opportunity to develop their own leaders or focus on problems peculiar to their sex.

By the beinning of the twentieth century union attitudes toward female workers had progressed from supreme indifference to open hositility. AFL President Samuel Gompers barred the Women's Trade Union League from the

22/ E.g., female printers, working side by side with males, were denied membership in the International Typographical Union for this reason. Candy workers in Philadelphia, hairdressers in Seattle and streetcar conductors in Cleveland met the same rebuff. Id. 78.

1905 AFL convention, attacked the presence of married women in the work force and refused to support a strike by female telephone operators in Boston.[23] Even during the famous garment workers strikes in 1909, Gompers openly questioned the ability of women to maintain sufficient cohesiveness and determination to form a viable union.[24] Gains made by female workers during World War I were quickly extinguished by union maneuvers such as the post-Armistice strike by male workers in Cleveland to force female streetcar conductors out of work.[25]

23/ Id. 76-77.

24/ The strike of the International Ladies Garment Workers Union during the harsh winter of 1909, described as the "Uprising of the 20,000," was the first general strike by female workers, and was a potent refutation of the argument that women could not withstand a long hard fight. But the settlements individually negotiated with each shop were probably far weaker than could have been achieved with broad union support.

25/ Chafe, supra note 12, at 53.

Without union support to fight for improved working conditions, women turned to state legislatures for protection through the passage of maximum-hour and minimum-wage legislation. This Court's support for Oregon's maximum-hour legislation for female laundry workers against constitutional attack in Muller v. Oregon, 208 U.S. 412 (1908), paved the way for passage of a rash of state "protective" laws that applied to women workers only. In addition to the ten-hour laws for women laundry workers upheld by Muller, eight-hour laws,[26] laws governing numerous other occupations,[27] and laws prohibiting night work,[28] all were upheld on

26/ E.g., Miller v. Wilson, 236 U.S. 373 (1915); Bosley v. McLaughlin, 236 U.S. 385 (1915).

27/ E.g., pharmacists, Bosley v. McLaughlin, 236 U.S. 385 (1915); and later, bartenders, Goesaert v. Cleary, 335 U.S. 464 (1948).

28/ Radice v. New York, 264 U.S. 292 (1924); People v. Charles Schweinler Press, 214 N.Y. 395, 108 N.E. 639 (1915).

the authority of Muller. While their origins -- and immediate effect -- were to relieve some of the worst abuses of the sweat shop system, these statutes were all used ultimately not to protect women workers but to exclude them from the most desirable jobs. As a result, large numbers of working women became isolated from the benefits of full participation in the workforce for decades to come.

Minimum wage legislation, compared to legislation restricting the hours and occupations in which women worked, fared less well in the courts. A District of Columbia minimum wage law which applied only to women was struck down in Adkins v. Children's Hospital, 261 U.S. 525 (1923). It was not until unemployment, starvation wages, conditions of profound hardship, and the continuing exploitation

of women workers peaked during the Depression of the 1930's that state legislatures took action and this Court re-evaluated its former position.[29] Following the passage of minimum wage laws for women by several state legislatures, the federal government enacted the National Industrial Recovery Act ("NIRA") in June 1933 and the Fair Labor Standards Act ("FLSA")[30] in 1938, both of which set minimum wages for men and women in occupations affecting interstate commerce. These laws, like their counterparts regulating hours and occupations, ultimately hurt women more than they helped. Under

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29/ See West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), holding that a state minimum wage law did not violate the Fourteenth Amendment due process clause, and overruling Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936), and Adkins v. Children's Hospital, 261 U.S. 525 (1923).

30/ 29 U.S.C. §201 et seq. (1970).

the NIRA one out of every four industrial codes permitted women to receive a lower minimum wage than men. The businesses affected were precisely those which employed the largest percentages of female workers.[31]

Thus, although protective labor legislation was ostensibly enacted to protect women from the harsh working conditions to which they were subject because they were not unionized, in fact it created a system which ensured that women would remain at the very bottom of the economic and employment ladder. Legislation like the NIRA reinforced the tradition of paying women less. Laws which theoretically

31/ In the cloak and suit industry, for example, women's basic wage was ten cents an hour less than men's. Women employed in laundries were allowed to earn as little as fourteen cents an hour, while waitresses in some areas received only twelve cents. Chafe, supra note 12, at 85.

protected women from difficult jobs really operated to preserve the highest paid jobs for men. For example, some laws prevented women from selling drinks or working at night, when tips were greater. Women could not take night shifts at factories and earn overtime rates. Nor could they enter the highly unionized heavy industries where salaries were higher and jobs more secure. In the last analysis, "protective" legislation protected male prerogatives more efficiently than it protected women's rights to full equality of employment in a safe and humane working environment.[32]

32/ Because of their discriminatory impact on women workers, state protective laws have now been universally rejected as a defense, under Title VII, to an employer's disparate treatment of female employees. Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971); LeBlanc v. Southern Bell Tel. & Tel. Co., 460 F.2d 1228 (5th Cir. 1972); Manning v. International Union, 466 F.2d 812 (6th Cir. 1972).

B. Position of Women in the Workforce Today

Contrary to popular belief, women workers have made few gains in recent years despite the advent of fair employment laws and the resurgence of the feminist movement. Women are still the most expendable members of the workforce. Under-skilled, under-unionized and underpaid, they are largely powerless to force employers to recognize their needs.

1. Industrial and Occupational Segregation

Distribution of women workers has changed little since the turn of this century. Women are still concentrated in the service industries.[33/] In fact,

33/ Over the past thirty years, women have constituted about 60% of all employees in the service sector. Over 40% of all women in the labor force are employed in this industry, more than twice the rate of men workers. Waldman & McEaddy, Where Women Work - An Analysis by Industry and Occupation, U.S. Dep't of Labor, Monthly Lab. Rev. 3,12 (May, 1974) [hereinafter cited as Waldman & McEaddy].

as service occupations have increased in type and volume, so has the female labor force.[34/] But the service industries are still the least skilled,[35/] lowest paid,

34/ In 1900, women constituted only 18% of all workers. Women's Bureau, U.S. Dep't of Labor, 1969 Handbook on Women Workers 9 [hereinafter cited as 1969 Handbook]. By 1973, they were 39% of all workers. Women's Bureau, U.S. Dep't of Labor, Women Workers Today 1 (1974). The population explosion of post-World War II contributed to the need for expanding all types of services, thus generating more jobs of the types traditionally considered female. Waldman & McEaddy, supra note 33, at 3.

35/ The federal government in its Dictionary of Occupational Titles, rates the skills required to perform service jobs at the very lowest level. The Dictionary rates the following five jobs as requiring the same level of competence: Foster Mother (rears children in home as member of family), Nursery School Teacher (organizes and leads activities of pre-kindergarten children, maintains discipline), Nurse, Practical (cares for patients and children in private homes, hospitals), Rest Room Attendant (serves patrons of lavatories in stores), Offal Man, Poultry (shovels ice into chicken offal containers). U.S. Commission on Civil Rights, Women and Poverty 76 (1974) [hereinafter cited as Women & Poverty].

and least likely to be unionized. Likewise, woman's place in the factory has changed very little, and women factory workers remain concentrated in the garment, textile, tobacco and light durable goods industries where wages are lowest.[36/]

No matter what the industry, however, women work in fewer occupations than men and are clustered in those occupations at the lower end of the economic scale. Forty-three percent of all working women are in clerical or sales jobs.[37/] In government and the finance, insurance, and real estate industries, 80% of all female employees are in clerical positions.[38/] Women only recently have begun

36/ Smuts, supra note 10, at 33.

37/ Waldman & McEaddy, supra note 33, at 10.

38/ Id. 8, 9.

to gain access to the skilled trades. For the first sixty years of this century women held between 2% and 3% of all skilled jobs. By 1970, this percentage had increased to only 5%.[39/]

Women workers in professional and technical groups are occupationally more disadvantaged than they were 30 years ago. In 1940 women held 45% of all professional and technical jobs; in 1970 the percentage had dropped to 38%.[40/] Women professional and technical workers are concentrated in the education and health sectors of the economy, where they constitute a majority of the total number of employees. But even where women dominate an occupation, they are

39/ Hedges & Bemis, Sex Stereotyping: Its Decline in Skilled Trades, U.S. Dep't of Labor, Monthly Lab. Rev. 14 (May, 1974).

40/ 1 Labor Pains 10 (1975) (published quarterly by Working Women United Institute, Ithaca, N.Y.).

still denied the top positions. For example, in the 1970's women hold 60% of all jobs in education.[41] They are 85% of elementary school teachers[42] and 70% of elementary and high school teachers combined,[43] but are only 28.4% of college presidents, professors and instructors.[44] In the health sector women hold 75% of all jobs,[45] but constitute only 12-1/2% of physicians.[46] They constitute almost all nurses, however.[47]

41/ Waldman & McEaddy, supra note 33, at 3.

42/ Blitz, Women in the Professions, 1870-1970, U.S. Dep't of Labor, Monthly Lab. Rev. 34, 35 (May,1974).

43/ Waldman & McEaddy, supra note 33, at 7.

44/ Blitz, supra note 42, at 37.

45/ Waldman & McEaddy, supra note 33 at 3.

46/ Id. 9.

47/ Blitz, supra note 42, at 35.

2. Unemployment

Because women, more than men, are likely to be marginally employed, the specter of unemployment looms very large for them.[48] In the first quarter of 1973, 24% more women than men were unemployed.[49] The unemployment rate for women

48/ "[W]omen are more likely than men to work for marginal businesses characterized by small size, low capital investment, low profit margins, haphazard personnel practices, high employee turnover, and low pay. Many thousands of women still work in such plants, making cheap clothing, costume jewelry, paper hats and party favors, inexpensive toys, picture frames, knickknacks, and similar products. Sometimes ignored by government and union alike, these are the plants where conditions are most likely to be reminiscent of the last century, even to the crudely lettered 'Operators Wanted' sign on the door. Usually located in old buildings in run-down neighborhoods, they draw upon the least educated and neediest portion of the labor supply: Puerto Ricans, Negroes, Mexicans, and poor white migrants from the rural South." Smuts, supra note 10, at 105.

49/ Despite the large size of this spread, the actual unemployment rate for women is believed to be still higher. In 1973 economist Barbara R. Bergmann reported that if the unemployment rate were adjusted to include

[footnote continued]

is inflated by sex discrimination in employment.[50] Being limited to many fewer occupations than men, they have fewer options when times are hard.

[footnote 49 continued]

discouraged women who had stopped looking for work, although they still wanted work, women's unemployment rate would be 35% higher than men's. Bergmann notes that this 35% figure does not reflect the number of women who have opted for public assistance or who respond that they are housewives rather than admit to their unemployment. Hearings Before the Joint Economic Comm. on The Economic Problems of Women, 93rd Cong., 1st Sess., pt. 1, at 70 (1973) [hereinafter cited as Economic Hearings]. Of the one million persons who have stopped looking for work out of discouragement, women number 70%. 1 Labor Pains supra note 40, at 10.

50/ "The demand for women's labor is kept artificially low because of their virtual exclusion from certain fields . . . and the supply of women to the few fields where they are welcomed is artificially increased thereby.

. . . .

" . . . We have a situation where a relative undersupply of men and a relative oversupply of women averages out to a high overall unemployment rate. The correct policy is . . . the enforcement of measures which encourage employers to relieve the scarcity of men by employing women in jobs for which they have previously not been considered." Economic Hearings, supra note 49, at 54-55.

3. Unionization

Unions by and large have continued their indifferent response to the needs of female workers. They still have avoided organizing the low-wage, low-skill jobs where women are concentrated. In the 1960's, although 37% of the workforce was female, women comprised less than 20% of union members. Only 14% of women workers were unionized as compared with 25% of men. Where women have been organized, they are concentrated in a few large unions. Among 190 unions participating in a 1966 U.S. Department of Labor survey, in only four unions did women constitute at least 80% of the membership; in only 26 unions did women constitute at least 50% of the membership. In 107 unions, however, women's membership was less than 10%.[51] While

51/ 1969 Handbook, supra note 34, at 9, 82.

the number of women union members has been increasing, it has not kept pace with the rate of increase of women in the overall labor force so that the ratio of women union members to employed women actually has declined over the past fifteen years. Moreover, even where women are unionized, they tend to be represented at the bargaining table and elsewhere by men. Women hold very few of the top union jobs, whether they are appointive or elective positions. Of the "top leadership and staff positions reported in the 1971 BLS Directory, women hold only 70 posts in 47 of the 208 unions and employee associations."[52/]

Because they have been excluded from positions of power in the labor movement, and because they often have been excluded from union membership altogether, women

52/ B.M Wertheimer & A.H. Nelson, Trade Union Women 7, 9 (1975).

workers have been deprived of the one meaningful mechanism for asserting their rights against their employers: strong and effective unionization. Women's demands are often the first things traded away at the bargaining table. In lawsuits involving sex discrimination issues, unions tend to take the management position. In fact, it appears that unions are paying less attention to the special problems of women than they were sixty years ago.[53/] Under these circumstances, it is no wonder that women as a group continue to be the most underpaid and exploited members of the workforce.

53/ Raphael, Working Women and Their Membership in Labor Unions, U.S. Dep't of Labor, Monthly Lab. Rev. 27, 32 (May, 1974).

4. Earnings Gap

The annual wage for women has never been more than two-thirds the average annual wage for men for any year in which statistics have been collected. In 1939, full-time women workers earned 60.8% of men's annual earnings.[54/] By 1955, the percentage had increased by only 3.1 points.

Today, despite the advent of fair employment laws and the growth of the women's rights movement, women have actually lost ground. According to the most recent census data, the earnings gap between men and women is widening rather than narrowing. In 1955 the average full-time year-round woman worker earned 63.9% as much as the average man; in 1970 she earned only 59.4%

54/ 1969 Handbook, supra note 34, at 137.

as much.[55/] The number of poor families headed by women has increased by 33% in the last decade.[56/]

Area wage surveys covering six industry divisions recently published by the Bureau of Labor Statistics indicate that on a nationwide basis, pay levels were consistently higher for men than for women working in the same occupation.[57/] Furthermore, women's income position relative to that of men within the same industry is also deteriorating. The median wage of women clerical workers dropped from 72% of that of men in 1956 to 67% of men in 1966; that of women operatives, from 62% in 1956 to 56% in 1966; and that of women sales workers

55/ Women's Bureau, U.S. Dep't of Labor, Fact Sheet on the Earnings Gap (undated).

56/ Women & Poverty, supra note 35, at 25.

57/ Waldman & McEaddy, supra note 33, at 11.

from 45% in 1956 to 41% in 1966. Income of women managers, officials and proprietors also declined in relation to that of men, from 64% in 1957 to 54% in 1966.[58] For the fiscal year 1974, ten years after the passage of the Equal Pay Act, the Labor Department found nearly 33,000 employees to be underpaid by more than $20.6 million.[59]

For those women who work in female-intensive industries, the picture is even more bleak. Most industries paying less than $100 a week are female-intensive. Male-intensive industries, on the other hand, are on a higher rung of the wage ladder where earnings average well over the $138 per week average for all workers.[60] In retail sales, for example,

58/ 1969 Handbook, supra note 34, at 134.

59/ Citizens' Advisory Council on the Status of Women, Women in 1974, at 7 (1975).

60/ Waldman & McEaddy, supra note 33, at 10.

where over 60% of employees are women[61] the average weekly wage in the sales of general merchandise is $82. Motor vehicle dealers, who include only 11% women, earn $152. Service industries which employ 60% women pay an average of $111 per week. The industries manufacturing transportation equipment and malt liquids, where the average weekly wages are $210 and $229, respectively, employ less than 10% women.[62]

The popular myth that education is the key to financial security is even less true for women than for other groups. The appalling fact is that women workers receive 30-40% less pay than men with the same or even less education.[63] Women of all races are paid less than

61/ 1969 Handbook, supra note 34, at 90.

62/ Waldman & McEaddy, supra note 33, at 10-11.

63/ Economic Hearings, supra note 49, at 54.

men of any race. For example, white women with a college degree earn less than nonwhite men with a high school degree. In 1966, the median annual income of non-white male high school graduates was $5,188; women college graduates earned only $4,165.[64/]

For women, the prospects for advancement and an increase in earnings are not good. Only 1.1% of working women earn over $15,000 per annum, compared to 13.5% of men. Of the 5.05 million jobs in the $15,000 per annum category, only 3% were held by women in 1970.[65/] Economist Robert Hall finds the picture a grim one:

64/ 1969 Handbook, supra note 34, at 141.

65/ K. Decrow, Sexist Justice 99 (1974).

> [T]he only group in our economy who continue to get higher earnings beyond the middle-twenties ages are white men: i.e., black men and all women have essentially no gains in pay or status to look forward to with age.[66/]

5. Fringe Benefits

Besides being segregated into dead-end jobs and short-changed in salary, women workers are treated unequally in terms of fringe benefits.

Private pension systems, for example, are increasingly under fire as discriminatory to women.[67/] A threshold problem is that the low-paying industries in which women typically work often do not offer pension benefits to their employees at all. Only 36% of working women, as

66/ Economic Hearings, supra note 49, at 61.

67/ See, e.g., Manhart v. Department of Water & Power, 10 FEP Cases 101 (C.D. Cal. 1975); Decision of EEOC 74-118, CCH Emp. Prac. Guide, ¶6431 (April 26, 1974).

compared with 52% of working men, are covered by such plans.[68/]

But the disparity in fringe benefits that affects women most seriously is the differential treatment they receive in connection with their childbearing functions. Sick leave policies, medical insurance plans and disability insurance plans all single out pregnancy for special treatment. Pregnancy coverage is either denied or severely limited, while male employees receive a full range of benefits for conditions which affect them.

Until shortly after the turn of this century, there was no such thing as maternity leave for disabilities resulting from pregnancy and childbirth. When a woman worker became obviously pregnant, she was summarily dismissed. In 1915

68/ Women & Poverty, supra note 35, at 118-19.

the New York State Commission of Education rendered a precedent-setting decision which allowed married women teachers an unpaid "maternity leave" as an alternative to resignation.[69/] Private employers eventually followed suit, but progress has been slow. Today the conditions surrounding maternity leaves for women workers are characterized by their arbitrariness and inconsistency. Employers variously allow a woman employee a voluntary "leave" -- with no guarantee of a job on her return or retention of her seniority -- or force her to take a mandatory leave of absence at an arbitrarily decreed stage of pregnancy.[70/] Frequently employers require a doctor's

69/ T. Hayden, Punishing Pregnancy: Discrimination in Education, Employment, and Credit 36 (ACLU Women's Rights Project Report 1973).

70/ Such a policy was successfully challenged on constitutional grounds in Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

certification before they will allow a pregnant woman to work beyond a certain stage of her pregnancy.

Whether leave for pregnancy is voluntary or required, however, a key fact must be borne in mind -- it is almost always an unpaid leave.[71/] Even where an employer has paid sick leave, compensatory time and/or vacation policies, female employees are usually prohibited from taking their accrued leave days

71/ Even when a woman is fired outright when pregnant she usually is ineligible for unemployment compensation. "As of January, 1973 the District of Columbia and 35 states treated pregnant women differently from other unemployed individuals in the distribution of unemployment compensation (U.S. Dept. of Labor Manpower Administration, Unemployment Insurance Service, Comparison of State Unemployment Insurance Laws, Comparison Revision No. 2, 4-46 (January 7, 1973), update of U.S. Dept. of Labor, Bureau of Employment Security, BES No. U-141, Comparison of State Unemployment Insurance Laws, 1970)" Peratis & Rindskopf, Pregnancy Discrimination As a Sex Discrimination Issue, ___ Women's Rights L.Rptr. ___ n.2 (1975) (to be published).

for purposes related to pregnancy. Such a policy has many harsh results. In many companies the accumulation of seniority, pension benefits, and related benefits, while unaffected by paid leaves of absence, is frozen during unpaid leaves of absence. Thus when a woman takes a leave of absence for pregnancy she loses valuable employee rights which men do not lose when they take a leave of absence for virtually any other purpose.

Moreover, health insurance policies provided by employers almost never cover the costs of pregnancy and childbirth to the same extent as other medical conditions. Basic coverage of doctors' fees and hospital costs is usually limited to a specific dollar amount and maternity expenses are most often the only category singled out for such limitation. Major

medical coverage almost always excludes any expenses attributable to normal pregnancy. The minimal coverage available for normal maternity -- and complications thereof -- is usually available only under a family plan (i.e., the female employee must opt for more expensive coverage since reserves for maternity are usually accumulated only from the family plan premium). Benefits are usually payable only for pregnancies that begin after the effective date of coverage, and, ironically, the wives of male employees may get more complete coverage than female employees themselves.[72/]

And, finally, disability insurance plans, offered by employers, which pay income to disabled employees while they

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72/ See Insurance Commissioner's Advisory Task Force on Women's Insurance Problems, Pennsylvania Insurance Dep't, Final Report and Recommendations 9-17 (1974).

are incapacitated, almost always exclude or limit coverage for pregnancy-related disabilities. In the case at issue here, the Liberty Mutual plan not only excludes coverage for disabilities connected with a normal pregnancy; it also excludes coverage for complications of pregnancy; and for any disability, totally unrelated to pregnancy, which a woman happens to suffer while she is pregnant.

The net result of all these policies, standard operating procedure in many companies, is that when a working woman becomes pregnant her employment is summarily disrupted and she loses income at a time when her financial needs are greatest. To make matters even more difficult, if she is fired, she cannot collect unemployment compensation. If she is forced on unpaid leave she loses seniority and pension benefits. If she is covered for

maternity by a health insurance plan, she is reimbursed for only a small portion of her childbirth expenses. For the period she is disabled, she is unable to qualify for disability insurance. Since the vast majority of women work to support themselves and their families, just a men do,[73/] this differential treatment works an untold hardship in terms of the immediate financial loss alone. Even more importantly, pregnancy policies which reinforce the societal attitude that a woman's work and income-

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73/ "Of the nearly 34 million women in the labor force in March 1973, nearly half were working because of pressing economic need. They were either single, widowed, divorced, or separated or had husbands whose incomes were less than $3,000 a year. Another 4.7 million had husbands with incomes between $3,000 and $7,000."

An income of $7,000 per year does not meet the criteria established by the Bureau of Labor statistics for even a low standard of living for an urban family of four. Women's Bureau, U.S. Dep't of Labor, The Myth and the Reality 1 & n.1 (May, 1974).

producing ability are less important than a man's, create a self-perpetuating cycle. The result is that every time a woman worker gives birth to a child, her work history is disrupted. When she returns to the labor force after childbirth, as most women do, she is forced to begin all over again to accumulate job and seniority rights and benefits and to re-establish her employment identity.

III

TITLE VII PROHIBITS PREGNANCY DISCRIMINATION BY EMPLOYERS, REGARDLESS OF HOW A PREGNANCY EXCLUSION IS TREATED OUTSIDE THE EMPLOYMENT CONTEXT IN A SOCIAL WELFARE PROGRAM ENACTED BY A STATE LEGISLATURE.

The Equal Employment Opportunity Commission ("EEOC"), as the agency charged with the responsibility of administering Title VII, has the authority to issue guidelines indicating what are or are

not proscribed discriminatory practices:

> Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972).

The Commission, drawing on its expertise in the area, has issued guidelines prohibiting employers from discriminating on the basis of pregnancy.[74/] These

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74/ The guidelines, 29 C.F.R. §1604.10 (1974) read as follows:

"Employment Policies Relating to Pregnancy and Childbirth.

"(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in prima facie violation of Title VII.

"(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion,

[footnote continued]

guidelines are entitled to great deference. Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4888 (U.S., June 25, 1975); Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971); Phillips v. Martin Marietta Corp., 400 U.S. 542, 545 (1971)

[footnote 74 continued]

> childbirth and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

"(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."

(Marshall, J., concurring). Indeed, the courts have declined to follow EEOC guidelines only when there has been a clear congressional policy indicating that the agency's interpretation of the statute was incorrect.[75/] With respect to the EEOC's pregnancy guidelines, not only is there no congressional policy to the contrary, in recent weeks Congress has explicitly approved the guidelines, almost word-for-word, in regulations promulgated pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. §§1681 et seq. (Supp. III, 1973).[76/] Moreover, the

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75/ See Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94 (1973). (EEOC guidelines providing that discrimination against aliens was discrimination on the basis of national origin conflicted with other federal legislation requiring United States citizenship as a condition of federal employment.)

76/ These regulations, published on June 4, 1975, by the U.S. Department of Health, Education and Welfare, provide that educational institutions receiving federal funds treat pregnancy disabilities suffered by their employees on the same basis they treat all other temporary

[footnote continued]

pregnancy guidelines have now been upheld by numerous federal district courts and by every appellate court which has considered the question. To date, there are six Circuit Court decisions approving the guildelines.[77/]

The company argues, however, that this Court's decision in Geduldig v. Aiello,

[footnote 76/continued]

disabilities. The regulations were studied by Congress for a forty-five day period during which they received considerable public and congressional attention. The fact that the guidelines now have been approved clearly indicates congressional support for the EEOC position. 40 Fed. Reg. 24128, 24144 (1975). See also, The Washington Post, July 10, 1975, at A7, col. ; The Washington Star, June 5, 1975, editorial page, col. .

77/ Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199 (3d Cir. 1975); Gilbert v. General Elec. Co., 10 FEP Cases 1201 (4th Cir. 1975); Communications Workers of America v. American Tel. & Tel. Co., 513 F.2d 1024 (2d Cir. 1975); Satty v. Nashville Gas Co., 11 FEP Cases 1 (6th Cir. 1975); Holthaus v. Compton & Sons, Inc., 514 F.2d 651 (5th Cir. 1975); Hutchison v. Lake Oswego School Dist., No. 74-3181 (9th Cir., July 21, 1975), aff'g 374 F.Supp. 1056 (D. Ore. 1974).

417 U.S. 484 (1974), invalidates the guidelines and in effect establishes the proposition that pregnancy discrimination is not sex discrimination under either the Fourteenth Amendment or Title VII. This position has no merit.

In its decision in Geduldig, this Court did not find that discrimination based on pregnancy was not sex discrimination. What the Court did hold was that California's exclusion of pregnancy benefits from its disability program was not sex discrimination of the precise kind involved in Reed v. Reed, 404 U.S. 71 (1971), and Frontiero v. Richardson, 411 U.S. 677 (1973).[78/] Reed and Frontiero

78/ "[T]his case is thus a far cry from cases like Reed v. Reed, 404 U.S. 71, and Frontiero v. Richardson, 411 U.S. 677, involving discrimination based upon gender as such. . . . While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those
[footnote continued]

both involved statutes which discriminated on the basis of gender itself. In Reed, the Court struck down a state law which set an automatic preference for males to serve as administrators of estates. In Frontiero, the Court dealt with a federal law requiring female military personnel to meet special dependency tests males were not required to meet in order to qualify their spouses for benefits. Pregnancy discrimination is not discrimiantion of precisely this kind, for it is based not on the fact of sex itself but on a sex-linked characteristic,

[footnote 78/continued]
considered in Reed, supra, and Frontiero, supra. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition." (emphasis added). Geduldig v. Aiello, 417 U.S. 484, n. 20 (1974).

pregnancy. In Geduldig, a majority of this Court found only that such discrimination was not sufficiently invidious and overt to justify setting aside a state statute, where the question was whether the state could constitutionally exclude pregnancy benefits from its state disability program.

But however discrimination on account of pregnancy fares in a non-employment context under the Fourteenth Amendment, it clearly is in violation of Title VII's proscription against sex discrimination in employment. Title VII is not directed toward the public policy judgments of state legislatures, but toward the internal employment practices of employers. When employment practices disproportionately disadvantage a class of employees protected by Title VII, as the pregnancy policy does here, they

violate the Act regardless of what constitutional standards might be applied in a non-Title VII case.[79/]

Pregnancy discrimination, as noted above, is the ultimate form of sex discrimination in employment. Employment policies which single out pregnancy disabilities for special, negative treatment inevitably injure large numbers of women workers, for so long as the human race continues to propagate itself, women will continue to become pregnant. Such policies unnecessarily interrupt the individual work history of females in the labor force and create artificial

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79/ Numerous other policies have survived constitutional attack only to be found illegal in the employment context. E.g., with respect to differential payments based on sex, compare Kahn v. Shevin, 416 U.S. 351 (1974) (State of Florida may allow a tax exemption to widows but not to widowers) with Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (Equal Pay Act, 29 U.S.C. §206(d) (1970) requires employer to pay females on day shift as much base pay as males on night shift). Cf. also, West

[footnote continued]

barriers to their advancement in employment. As such, they are precisely the kinds of discriminatory practices Title VII was designed to eliminate.

IV

ANY INCREASED EXPENSE OF PROVIDING PREGNANCY DISABILITY BENEFITS IS NOT A JUSTIFICATION FOR DENYING THEM.

Providing fringe benefits of any kind costs an employer money, and providing an income protection plan covering pregnancy disabilities is no exception. Without question, an employer may choose to withhold or limit such benefits for all his employees, for reasons of cost, without violating Title VII. But when an employer provides a complete package of

[footnote 79/ continued]

Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) with Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969), for differing judicial treatment of state protective labor laws.

benefits covering every disability except one, which affects only women, then the policy inevitably has a sex-discriminatory impact.

Liberty Mutual's income protection plan provides benefits for virtually every disability requiring the care of a doctor, except disabilities relating to pregnancy. Many of the conditions covered are serious conditions involving long periods of disability and resulting in high costs to the company. Coronary heart disease and emphysema are two of the most serious, and both of these conditions have a much higher incidence among men than women.[80/]

80/ The rates of coronary heart disease for different age groups of men and women are as follows:

	All ages	under 45	45-64	65 & Over
	(Rate per 1,000 population)			
Men	19.0	1.6	48.1	95.7
Women	13.6	0.8	22.6	75.7

Public Health Service, U.S. Dep't HEW, Prevalence of Chronic Circulatory Conditions United States, 1972, No. (HRA) 75-1521, Series 10-No. 94, at 23, Table 3 (1974).

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Men in the general population are disabled by these diseases approximately one and one-half times as much in any one year as

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[footnote 80/ continued]

The number of men under 65 experiencing coronary heart disease is proportionately much greater than that of women. For men and women under 45, men had twice as high an incidence as women; for men and women between ages 45 and 64, men had 2.12 times the incidence in women. The overall figure (19.0 for men compared with 13.6 for women), therefore, is deceptive, since it includes people over age 65, who are not part of the workforce. In a population of working age (under age 65), men therefore would have an even higher rate of incidence of coronary heart disease over women than the overall figures indicate.

The rates of emphysema for different age groups of men and women are as follows:

	All ages	under 45	45-64	65 & Over
	(Rate per 1,000 population)			
Men	10.3	1.2	22.1	58.8
Women	3.1	0.8	6.5	11.6

Public Health Service, U.S. Dep't HEW, Prevalence of Selected Chronic Respiratory Conditions, United States-1970, No. (HRA) 74-1511, Series 10-No. 84, at 16, Table 2 (1974).

women are disabled by the same conditions.[81/] Liberty Mutual's plan also covers disabilities due to ulcers, prostatectomies, hernias and gout, which, while they do not normally involve prolonged periods of disability, are conditions which primarily or exclusively

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81/ Using a population of 1,000, the 13.6 women who are disabled by coronary heart disease in a single year are disabled for an aggregate total of 292.57 days. The 19 men who are disabled are incapacitated for a total of 408.74 days. These estimates were obtained by multiplying the number of persons disabled by coronary heart disease in each sex by the number of bed disability days for coronary heart disease each group experiences during the year. Prevalence of Chronic Circulatory Conditions, supra note 80 at 7, Table C. The disability days for emphysema are: 3.1 women disabled for an aggregate total of 11.25 days; 10.3 men disabled for an aggregate total of 37.37 days. Prevalence of Selected Chronic Respiratory Conditions, supra note 80, at 6, Table C.

The totals for the two conditions are: women disabled for 303.82 days per year; men disabled for 446.11 days per year.

affect men.[82] The plan also covers alcoholism which, by the company's own admission, is twice as likely to affect men as women.[83]

82/ The incidence of these conditions is as follows:

	Ulcers	Prostatectomy	Hernia	Gout
	(Rate per 1,000 population)			
Men	22.0	-	20.9	6.9
Women	12.6	-	12.0	2.9

From: Public Health Service, U.S. Dep't HEW, Prevalence of Selected Chronic Digestive Conditions, United States - July-December 1968, No. (HRA, 74-1510, Series 10-No. 83, at 18, Table 2 and 19, Table 3 (1973); Public Health Service, U.S. Dep't HEW, Prevalence of Chronic Skin and Musculoskeletal Conditions, United States-1969, No. (HRA) 75-1519, Series 10-No. 92, at 36, Table 17 (1974).

83/ Brief for Petitioner at 20. The company says in its brief that alcoholism is not covered by the plan. This is a misstatement of fact. Like every other condition which the plan covers, disabilities due to alcoholism are compensable if the disabled employee is under medical care.

In seeking ways to reduce costs the company has not chosen to eliminate or limit any benefits for the foregoing conditions. Nor has it sought to limit benefits across the board for conditions affecting men and women equally. Instead, the company has chosen to eliminate a benefit which affects only women and which -- because of women's dual role as wage-earner and child-bearer -- affects women profoundly.

This decision reflects, once again, the underlying political realities in this case: regardless of cost, employers do in fact accommodate themselves to meet the special needs of male employees. They do not do so for female employees because women are viewed as an expendable source of cheap labor, a group that is willing to work for low wages and inadequate benefits because -- thanks

to nationwide patterns of discrimination -- other, better jobs simply are not available. In the words of one expert, writing in 1929, "The woman is nearly always the cheap or marginal worker, and . . . she is expected by the public and employer to remain one."[84/]

Liberty Mutual, of course, is a company which has taken advantage of its female employees in many ways. Until women challenged its practices, the company sex-segregated its jobs and paid female "claims representatives" less than it paid male "claims adjusters" for doing the same work. The company would

84/ Statement of Alice Rogers Hagar, quoted in Chafe, supra note 12, at 65. As economics expert Professor Paul A. Samuelson has more recently observed, for the employer, sex discrimination is profitable. In congressional hearings on the subject, he questioned whether an unconscious realization of this fact has not reinforced prejudice on the part of employers who stand to reap extra profits from hiring low-cost women. Economic Hearings, supra note 49, at 62-64.

not allow women to transfer to the higher-paying position, nor would it promote female employees to any but a limited number of supervisory positions in the claims department. The statistical evidence of discrimination was overwhelming.[85/] Witholding benefits for pregnancy is Liberty Mutual's last form of resistance to the idea that it must treat its male and female employees equally.

But whatever the political realities may be, as a legal matter, under Title VII cost is not a defense to this type of discrimination. First, a policy of this kind, which cannot ever have a negative impact on male workers, either singly or as a group, is overtly discriminatory against women. As such, it is not the

85/ See 372 F.Supp. at 1149-51; 508 F.2d at 257-58.

kind of facially neutral policy to which cost, or any other business purpose rationale, may ever be a defense. Liberty Mutual may not exclude benefits for a condition unique to women, any more than it may exclude benefits for a condition virtually unique to blacks, such as sickle-cell anemia, merely because including such benefits costs money. As EEOC guidelines provide, and as the appellate court noted, cost is simply not a defense to this action.[86/]

Moreover, even if cost could be asserted as a legal defense in this case, Liberty Mutual has not met its heavy burden of proof to show that there are no other

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86/ 511 F.2d at 206, citing 29 C.F.R. §1604.9(e) (1974), which provides that;

> "It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other."

less discriminatory ways of reducing expenses.[87/] Here, on the contrary, there are numerous alternatives to a policy penalizing pregnant women, ranging from a general reduction of benefits to a limitation on some of the kinds of coverage which, at present, disproportionately benefit men.

And, finally, Liberty Mutual has not only failed to meet its burden of proof on this issue; it has failed to offer any evidence whatsoever of what its costs might be. Instead, the company has relied on general statistics and, in particular, on briefs written by other parties in other cases. Surely as an insurance company whose daily business it is to

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87/ As already noted, the courts have construed the business necessity defense narrowly, supra note 3. Cost has specifically been rejected as a consideration which, by itself, justifies discrimination. Robinson v. Lorillard Corp., 444 F.2d 791, 799, n.8 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

estimate the costs of insurance coverage of this kind, Liberty Mutual should have been in a position to present data justifying its pregnancy policy for its own employees if such data exists. Since this evidence was not presented, this Court should dismiss the company's hypothetical cost arguments out of hand.

CONCLUSION

In the last analysis, this case presents the timeless problem of a powerless labor group being relegated to second-class economic status by an employer's policies. Women have historically been denied equal wages and equal job opportunity; and they have been locked even further into this inferior position by employment policies which penalize them for their unique biological role as child-bearer. Liberty Mutual's refusal to provide disability benefits for pregnancy-related disabilities on the same terms that it provides disability benefits for all other conditions is sex discrimination in its

purest form. This Court should affirm the Third Circuit decision and add its voice to the prevailing view that such policies violate Title VII of the 1964 Civil Rights Act.

Respectfully submitted,

Diane Serafin Blank
Nancy E. Stanley

BLANK GOODMAN KELLY
RONE & STANLEY
36 West 44th Street
New York, N.Y 10036
(212) 869-0020

Attorneys for Blank
Goodman Kelly Rone
& Stanley as Amicus
Curiae

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Attorneys for Amicus gratefully acknowledge the assistance provided in the preparation of this brief by Marguerite R. Greenfield, third-year law student at Northeastern University School of Law, Boston, Massachusetts; Barbara Ann Frouman, third-year law student at Hofstra University School of Law, Hempstead, New York; and Ellen Wertheimer, Yale '75.